

# RETHINKING CORPORATE RETRIBUTION

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## I INTRODUCTION

As unlikely as it might seem, the large literature on the theory of corporate criminal liability appears to have insufficiently attended to an important point. In the endless debates about the purposes of corporate criminal liability, it has been overlooked that corporations cannot be retributively punished.

This is a more particular point, with specific implications, than the familiar and blunter claim that the application of criminal law to corporations is simply nonsensical in terms of punishment theory's concern with moral responsibility because legal entities are not people.<sup>1</sup> To the contrary, corporations can be blameworthy, that is, they can do things that provide retributive justification for punishment. Corporations also can be punished. The problem arises at the last step of the analysis: Corporations cannot be punished *retributively*. This point, I will claim, is important to understanding how corporate criminal liability has developed and is practiced in contemporary legal systems.

To set the table, there are several premises that can claim wide though not universal support. First, corporations act in the world, through the collective actions of their agents. Second, when corporations act (or, if one prefers, when they are the host or source for group actions), they sometimes generate risks and harms. Third, some such risks and harms are properly designated as culpable wrongs.

Mainstream retributivist theory holds that wrongdoers should or must be punished because they deserve punishment on account of their wrongdoing.<sup>2</sup> Various lines of argument about what wrongdoers retributively deserve have

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1. E.g., John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 (1981) (quoting Edward, First Baron Thurlow); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320–21 (1996).

2. Mitchell N. Berman, *Modest Retributivism*, in LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 35, 37 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016); Mitchell N. Berman, *Two Kinds of Retributivism*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433, 433 (R.A. Duff & Stuart P. Green eds., 2011) [hereinafter Berman, *Two Kinds of Retributivism*]; Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Schoeman ed., 1987). For an example of an alternative “axiological” account of retributivism that critiques the more conventional deontic approach, see generally LEO ZAIBERT, *RETHINKING PUNISHMENT* (2018).

pointed to suffering, pain, “hard treatment,” a “set back to interests,” or a reduction in well-being as satisfying the retributive demand for acting upon desert.<sup>3</sup>

Corporate retributivism founders here. As an empirical matter, only living things can suffer, experience pain, or endure “hard treatment.” Corporations might appear to be candidates for “setbacks to interests” or “reductions in well-being,” but only if one defines these concepts in ways that unmoor them from the structure of retributive theory. Matters can go less well for a corporation as a result of things done to it, including by legal processes. But a mere “set back” to the economic prospects of a going concern cannot deliver a morally meaningful deprivation that produces the good that retributivism demands in response to the moral wrong of a crime. Therefore, corporations cannot be objects of retributive punishment *even if*, as I and many others believe, corporations can be blameworthy.<sup>4</sup>

Corporations easily can be punished. Legal process can do things to corporations that are costly and influential, which may cause corporations, through their agents, to change how they act. Thus, the literature is brimming with consequentialist arguments for corporate criminal liability and corporate punishment.<sup>5</sup> But corporations cannot be *retributively* punished because they cannot be harmed or set back in ways that could satisfy the requirement to answer a wrong against persons with an equivalent or fitting deprivation against the wrongdoer. Even if it were possible to imprison a corporation, or flog it, or stop its heart, such a punishment could not be retributive.

Punishment of corporations can, of course, cause *people* to suffer or endure setbacks that they might deserve. But individuals can deserve to be punished only in proportion to their own wrongdoing. One individual cannot be a justified retributive object on account of others’ wrongdoing simply because of a legal-institutional relationship among them—as opposed, for example, to being responsible on account of the individual’s culpable complicity in the wrongdoing of others. And, of course, individuals affiliated with a corporation may deserve some blame if something goes wrong in the firm, even if their individual blameworthiness is insufficient to justify official punishment.

Some argue for corporate retributivism on the grounds that (1) corporations can be blameworthy; (2) people believe that blameworthy corporations deserve

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3. See *infra* notes 23–43 and accompanying text.

4. See, e.g., KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS 75–90 (1990); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 491–500 (2006) (including sources cited therein).

5. See, e.g., Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 692 (1997); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 834 (1994); see also Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 858 (1984); Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1346 (1982); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1231 (1984).

to be punished; so (3) corporations should be punished in order to deliver on a justified demand for corporate desert. These are obviously consequentialist arguments. If retribution against corporations cannot actually be achieved, corporate punishment must be delivering something else in response to the understandable demand for corporate desert. That something may be socially beneficial. But it is not retributive.

While this argument, to be developed in what follows, echoes the aphorism that a corporation has “no soul to damn, no body to kick,”<sup>6</sup> the old metaphor—which has been deployed, often confusingly, to support a diversity of arguments about corporate punishment—does not capture the point. The state has many means by which to damn and kick corporations, that is, means by which to make a corporation’s affairs go less well in response to its conduct, including by damaging or even destroying a corporation’s identity or existence. Corporate punishment is no difficulty.<sup>7</sup>

The problem is that a corporation, however much it may be affected by the damning and kicking, cannot be made to endure the punishment in a way that would count as retributive. For legal entities, pain, setbacks, suffering, hard treatment, and loss of well-being are only (ill-fitting) synonyms for losses. As with tangos, it takes two to retribute: For retribution to occur, it must be both delivered and received—and its receipt must occur in the requisite morally significant way, not through a solely instrumental process (one that applies measures to a subject designed to induce behavioral alterations). The apposite metaphor would perhaps be something far less felicitous, like “a corporation has no psyche at which to direct deprivation.”

It follows that if corporations cannot receive retribution, there can be no retributive constraint on corporate punishment. Thus, any prohibitions on “unjust” corporate punishments must arise from either instrumental analysis or some other theory, perhaps one about fairness and procedural rights, establishing why it would be wrong to punish a corporation that did not engage in culpable wrongdoing.

The developed form of this argument will, it is hoped, illuminate aspects of the contemporary corporate prosecution program in the United States, as administered by the Department of Justice (DOJ). Since 1999, the DOJ has published and pursued a thoroughlygoingly instrumentalist program for imposing corporate criminal liability.<sup>8</sup> In large part because of that program’s close focus

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6. See Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 309 (1985) (quoting R. CROSS & P. JONES, INTRODUCTION TO CRIMINAL LAW 122 (R. Card ed., 10th ed. 1984)).

7. W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601, 624 (2017) (“Corporations obviously can be harmed, and plausibly can experience harm: they can have their charters to exist revoked, their property seized, or their internal structures forcibly reworked in ways that severely impair the corporation from pursuing its goals.”); see SCHLEGEL, *supra* note 4, at 147–73. Thomas uses the word “experience,” but it is not clear whether he means something like “be affected by” or rather “feel.”

8. U.S. Dep’t of Just., Just. Manual, § 9-28.000 (2018).

on questions of social welfare—and the manner in which social welfare analysis of corporate affairs tends to be conducted in the United States—prosecutors have developed a practice of commonly negotiating and settling with corporations.<sup>9</sup>

Much of the public and the media has been dissatisfied with this corporate prosecution program, some intensely so.<sup>10</sup> There are a variety of objections to the DOJ's conduct, often including cogent suggestions for reform. But, among the voices of dissent, there is a common and simple theme that the government “keeps letting corporations off the hook,” and the like.

This objection should not be surprising. Whether or not the DOJ is punishing corporations enough, and in the right ways, to achieve beneficial changes in corporate behavior, prosecutors are not delivering desert upon corporations—because they could not do so even if that were their objective. In a simple way, this is true because the doctrine that federal prosecutors deploy against corporations, *respondeat superior* liability, imposes a broad form of agency liability on companies that requires no inquiry into corporate institutional fault. But the theoretical deficit in retributive corporate punishment, in a deeper way, means that corporate prosecutions cannot accomplish retributive punishment regardless of the applicable liability rule.

A puzzle is thus partially illuminated. It has remained mysterious why corporate criminal liability is so attractive to both the public and officials even though the only remedy that criminal justice systems can impose on corporations—that American-style civil process cannot—is to convict them, that is, to declare them guilty of a crime.<sup>11</sup> Indeed, a great deal of the unhappiness with the DOJ's program is that prosecutors most often settle cases through deferred prosecution and nonprosecution agreements (DPAs and NPAs) that are said to coddle corporations because, in such deals, firms avoid criminal conviction.

But why should a conviction by itself matter, given that it is only an entry on a court's docket?<sup>12</sup> Perhaps convictions matter because they are the most public and official way to say that a corporation deserves to be punished, even though

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9. See generally BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014); Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697 (2020).

10. See, e.g., JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> [<https://perma.cc/RYZ8-M7MK>]; David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1301 (2013); see also SAMUEL W. BUELL, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE* 109–75 (2016) (assessing such claims in depth).

11. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1532 (1996) (arguing that corporate civil liability could replace corporate criminal liability).

12. See Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87, 91 (Jennifer Arlen ed., 2018) (finding that guilty pleas and deferred prosecution agreements impact firms similarly).

it cannot actually receive its desert in the form of a sentence. “We declare this group project worthy of blame even though, alas, we cannot make it endure retribution for its wrong.” Such a statement may be warranted and accurate, and may have useful effects. It is also an admission of the impossibility of corporate retribution.

In the remainder of this Article these arguments are expanded, first by distinguishing several lines of retributive argument, then by applying those arguments to corporations, and finally by showing how common claims about what is often called corporate “retribution” actually serve the mainstream and dominant discussion of consequentialism, and particularly instrumentalism, in corporate punishment.

## II

### THE ARGUMENT FROM THEORY

To claim that there can be no retributive punishment of corporations because non-persons (or “merely” legal persons) cannot be objects of retribution is, of course, conclusory. And an assertion such as that a corporation has “no soul to damn” is not grounded in modern retributive theory, which works with reason, not spiritual belief. This Part summarizes the particular claims of retributive theory in order to set the stage for further examining the application of that theory to corporations.

#### A. Retribution

The simplest and most common way to state the theory of retribution, as a general justifying aim of the criminal law, is in terms of a moral imperative that wrongdoers deserve punishment on account of their wrongdoing.<sup>13</sup> This major premise of retributivism can frustrate some because it seems so abrupt, even a touch circular. But the full-throated retributivist (sometimes termed the “positive” retributivist) does not see it that way. For her, the theory, at the level of first principle, is elegant for its simplicity and clarity.

With the concession that the particulars of retributivist theory continue to be debated at enormous length, we might parse the major premise into three elements.<sup>14</sup> First, there must be wrongdoing committed by a wrongdoer—opening the way to rich debate about what moral wrongs are, and which ones warrant designation as crimes.<sup>15</sup> Next is the question of why moral wrongdoing produces, in Joel Feinberg’s formulation, a “desert basis,” such that punishment of the wrongdoer should or must follow from her wrongdoing—and why the state

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13. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 153–59 (1997); Michael S. Moore, *Justifying Retributivism*, 27 *ISR. L. REV.* 15, 15 (1993).

14. For a full and clear discussion of the main issues in retributive theory and the leading literatures, see Alec Walen, *Retributive Justice*, *STAN. ENCYCLOPEDIA PHIL.*, <https://plato.stanford.edu/entries/justice-retributive/> [<https://perma.cc/5998-BJ22>].

15. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 14 (2008).

should be the one to impose it.<sup>16</sup> Third is the question of what desert demands be done to the wrongdoer on account of her wrongdoing.<sup>17</sup>

Across each of these three questions, the major premise holds. Retribution, when demanded, is pursued in order to fulfill a moral imperative—that the wrongdoer must be punished. Whether such punishment produces benefits or harms is irrelevant to a “pure” or “full-throated” retributive theory. One can style retributivism as a broadly consequentialist theory by including the good of satisfying retributivism’s moral imperative within the desirable products of punishment.<sup>18</sup> But that is the only sense in which retributive theory can be said to look forward.

For many, an entailment of retributive theory is what is commonly known as “negative” retributivism, sometimes referred to as retributivism’s “side constraint” on consequentialism.<sup>19</sup> On this view, it is also (or instead) a moral imperative that wrongdoers never be punished in excess of their desert. Thus, no matter how great the social benefits of a given punishment might be, any imposition of such punishment on a non-wrongdoer is a prohibited moral wrong.

To consider, at a categorical level, the application of retributive punishment to corporations, we need not grapple with the question of what may count as moral wrongdoing deserving of punishment. The present subject is punishment of corporations for any crime, not which actions, among all those a corporation might take, should be criminalized.

Neither need we dwell on the question of why wrongdoing produces a desert demand—the fulcrum of retributive theory. The objective here is not to reargue the central claim of retributivism, but to assume it. If a corporation can be a wrongdoer, then retributivism demands that the state deliver desert to the corporation on account of its wrongdoing. To fail to pursue desert would be to defy retributivism’s command. Whether, for example, such desert is required in order to “balance the moral ledger,” simply because it is morally good to do what is morally required, or for some other reason, are debated matters of retributive theory that are not material to the question of whether corporations can be punished retributively.<sup>20</sup>

What desert demands be done to the wrongdoer on account of her wrongdoing, however, is the central question in considering corporate

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16. JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 58 (1970); David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 *LAW & PHIL.* 507, 508 (1997); Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 *LEGAL THEORY* 113, 114 (2008).

17. See Michael T. Cahill, *Retributive Justice in the Real World*, 85 *WASH. U. L. REV.* 815, 825–42 (2007).

18. Berman, *Two Kinds of Retributivism*, *supra* note 2, at 339–40; see also Moore, *supra* note 13, at 19 (“[W]hat is distinctively retributivist is the view that the guilty receiving their just deserts is an intrinsic good. It is, in other words, not an instrumental good.”).

19. R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 *CRIME & JUST.* 1, 7 (1996).

20. *Id.* at 26–28.

retribution. “Punishment” is not an easily defined term.<sup>21</sup> It tends to represent a category of things more than a clearly specified concept. What counts as punishment depends on many things, not least the purpose or purposes for which the action denoted as punishment is carried out. In Joel Feinberg’s oft-quoted formulation, punishment is the unique coupling of official sanctions with official condemnation: “Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or those ‘in whose name’ the punishment is inflicted.”<sup>22</sup> Of course, there can be no expression of condemnation without the infliction of the punishment that does the expressing.

To say that retributivism demands that wrongdoers be punished on account of their wrongdoing invites the question of what it is that must be done to wrongdoers in order for it to be said that they have been punished. What is it exactly that wrongdoers *deserve*?

A rough count would likely reveal the most common view in the modern literature to be that retribution requires the infliction of suffering.<sup>23</sup> As Rawls put it, “It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing.”<sup>24</sup> The terms “hard treatment” and “pain” are also sometimes used in addition to or in place of suffering.<sup>25</sup> These ideas amount to the same thing: that to punish a person retributively is to set out to make her endure a treatment or process designed and intended to be difficult or unpleasant to endure. Since corporal punishment is not used in Anglo-American legal systems, these treatments now generally take the form of deprivations, most commonly deprivation of liberties and comforts.

Along this line of retributive analysis, a debate that has followed has been described, in an oversimplification, as between “objectivists” and “subjectivists.”<sup>26</sup> Objectivists, one might summarize, maintain that the desert

21. See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (defining punishment as “unpleasant physical consequences” plus condemnation).

22. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965).

23. FEINBERG, *supra* note 16, at 67 (“It is an essential and intended element of punishment . . . that the victim be made to suffer.”); Moore, *supra* note 13, at 21 (“[O]nly when harsh treatment is imposed on offenders in order to give them their just deserts does such harsh treatment constitute punishment.”); see also JOHN KLEINIG, PUNISHMENT AND DESERT 67 (1973); Berman, *Two Kinds of Retributivism*, *supra* note 2, at 438; A.M. Quinton, *On Punishment*, 14 ANALYSIS 133, 136–37 (1954); Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 960 (2000). Some would substitute “pain” for suffering as the object of retribution, but this amounts to the same point. See NILS CHRISTIE, LIMITS TO PAIN 5 (1981); K.G. Armstrong, *The Retributivist Hits Back*, 70 MIND 471, 473 (1961) (defining punishment as “the deliberate infliction of pain”).

24. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955).

25. For example, Schlegel, in a frequently cited monograph defending the idea of corporate retribution, says that corporations may be given “hard treatment” and “vary greatly in their capacity to endure hard treatment,” without argument as to how this vocabulary suits corporate subjects. SCHLEGEL, *supra* note 4, at 153 (emphasis added).

26. See John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1069 (2009) (arguing that retributivism needs to account for individual responses

demand is that the state carry out the required punishment, and that ends the matter. If the wrongdoer for some reason welcomes the punishment, is indifferent to it, or does not experience it, that does not negate retribution—as long as the punishment imposed is the one that retribution demands, and the wrongdoer at least has the *capacity* to be punished even if he does not in fact experience the punishment in the modally expected manner.<sup>27</sup>

Subjectivists, on the other hand, maintain that retribution requires that the wrongdoer's suffering or experience be the designed one in each instance of punishment. Indeed, some argue that an individual wrongdoer's suffering is the essence of the punishment that retribution demands and that the state's actions to bring about that suffering are not the punishment itself but rather its instrument.<sup>28</sup>

Much of this debate has been concerned with whether it matters that people commonly experience equivalent punishments differently.<sup>29</sup> For example, if suffering is what retribution demands in the way of punishment, should punishments be imposed, as in current practice, “objectively” in terms of, for example, years in prison, or “subjectively,” in terms of something like units of suffering, calculated according to the individual wrongdoer's liability to suffer from a particular form of punishment.

Some have described retribution as requiring a less overtly affective form of deprivation, such as a set-back to interests or well-being.<sup>30</sup> As Mitchell Berman has put the point, desert demands (considerations of proportionality aside) that the wrongdoer's life “go less well” as a consequence of her wrongdoing.<sup>31</sup> Or, if one is concerned about the question of subjectivity addressed in the debate just described, at least that the state imposes a punishment that is expected or intended to make the wrongdoer's life go less well.

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to punishment); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1624–25 (2010); Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 184 (2009) (arguing that accounting for subjective experience is necessary in justifying punishment); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 909 (2010) (arguing that subjective variations do not matter greatly to retributivism).

27. Markel & Flanders, *supra* note 26, at 941.

28. Kolber, *supra* note 26, at 218; Bronsteen, Buccafusco & Masur, *supra* note 26, at 1069–70.

29. Gray, *supra* note 26, at 1623; Kolber, *supra* note 26, at 184; Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 6 (2012); Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1, 2 (2009); *see also* David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53, 59–63 (1989) (in examining the “moral luck” problem in how to punish attempts, stating that many aspects of how punishment differentially affects individuals necessarily creates a kind of “punishment lottery”).

30. For discussion of the connection between desert and well-being, see SHELLY KAGAN, *Moral Desert*, in THE GEOMETRY OF DESERT 3–17 (2012).

31. Mitchell N. Berman, *Rehabilitating Retributivism*, 32 LAW & PHIL. 83, 87 (2013) [hereinafter Berman, *Rehabilitating Retributivism*]. Indeed, for Berman the intentional infliction of suffering is the essential fact about punishment that gives rise to the requirement that punishment be justified, and thus to the grounds for all general theories of punishment. Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258, 266 (2008).



Without grounding a theory of retributive punishment in suffering, set-backs to interests or well-being, or other forms of deprivation, it is difficult to construct a distinctive and persuasive account of what it is that punishment must do in order to count as retributive. As soon as one begins to talk about making the wrongdoer think about her wrong, or change her behavior, or the like, one strays into the realm of mainstream instrumentalist punishment theory (reform and rehabilitation, specific deterrence, and the like).<sup>32</sup>

Consider lines of theoretical argument that describe the purposes of punishment as more communicative than painful. Some who have been called “expressive retributivists” assert that “condemnation, instead of or in addition to hard treatment, is what the wrongdoer deserves.”<sup>33</sup> Others who have been called, not always with precision, expressive theorists of punishment describe punishment as communicating the victim’s moral worth in relation to that of the offender (Jean Hampton, for example); as communicating to the offender the nature and implications of her offense so that she will internalize the moral matter (Antony Duff, for example); as speaking the morally true “language of condemnation, censure, and vindication” in response to crime’s false “language of dishonor and disrespect” (Stephen Garvey); or as communicating “certain messages of condemnation through coercive sanctions to the person most in need of hearing these messages: the offender” (Dan Markel).<sup>34</sup>

Arguments such as these, based in the production of communicative effects, do not succeed in removing the necessity of actually or potentially experienced deprivation from the retributive punishment equation. These arguments are consequentialist, in the broad sense, in their concern with not only conveying meaning but having meaning internalized. In any event, they depend on the possibility of an affective subject of punishment, to whom condemnatory and similar messages can have meaning, and particularly meaning with impact on the subject’s emotions, beliefs, and self-understanding.<sup>35</sup>

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32. FEINBERG, *supra* note 16, at 81 (“Utility is not a desert basis for any deserved mode of treatment . . . to say ‘S deserves X because giving it to him would be in the public interest’ is simply to misuse the word ‘deserves.’”); see also Kip Schlegel, *Desert, Retribution, and Corporate Criminality*, 5 JUST. Q. 615, 617–26 (carefully disentangling arguments about corporate punishment to distinguish retributive from consequentialist claims) (1988).

33. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1421 (2000).

34. *Id.* at 1422–27; Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1820–21 (1999); Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 25–26 (2012).

35. See, e.g., Garvey, *supra* note 34, at 1838 (explaining how Moore’s theory of retribution asks us to consider how the ideal serious offender would feel guilty and deserving of suffering and apply that desert to the question of how to treat the actual offender—to which Garvey adds the claim that the ideal offender would also desire to atone); Markel, *supra* note 34, at 28 (“By imposing the punishment upon a competent offender, we are able to communicate to him (and also express to others) our commitment to certain specific values of political morality.”); Markel & Flanders, *supra* note 26, at 910 (“[A] person selected for punishment must be a fit interlocutor for the communicative message of retributive punishment.”); Gideon Rosen, *The Alethic Conception of Moral Responsibility*, in THE NATURE OF MORAL RESPONSIBILITY: NEW ESSAYS 65, 82 (Randolph Clarke et al. eds., 2015) (“[W]hat resentment

Some who have pursued retributive theory along these communicative lines, including Jean Hampton, have said that suffering through punishment is the mechanism by which the relevant retributive goal is pursued.<sup>36</sup> Even if one would deny the necessity of punishment as suffering in favor of, for example, Dan Markel's idea of punishment "as an attempt to communicate to the offender society's condemnation by means of an objective good such as liberty," one must explain how deprivations of this sort can count as "punishment" *other than* due to the deprivation involved in enduring them.<sup>37</sup>

If one instead maintains that retributivism requires that a proportionate punishment be imposed on grounds such as "to balance the moral ledger," "to answer one wrong with another," as a matter of distributive fairness, as condemning the moral wrong of social free-riding, or the like, one does not quite reach the bottom of the matter.<sup>38</sup> How is it that punishment of a wrongdoer could be equated with a wrong or serve to balance the weight of that wrong on a moral scale? Only by being a wrong of some sort itself. What kind of wrong could punishment be, if one sets aside matters of social costs and benefits? None other than the infliction of a deprivation upon the offender that must be "suffered," even if it does not lead to actual suffering.

Without at least the potential of the offender's experience of deprivation, there could be no moral wrong to answer the wrongdoer's wrong. And as Jean Hampton argues, a "free rider" or "distributive justice" theory of retribution that justifies punishment as ensuring the fair allocation of benefits and burdens across society fails to account for retribution with the worst crimes, ones for which almost no non-offender would feel any cost in refraining from committing the crime.<sup>39</sup> (When Hampton asserts that "retribution is actually a form of compensation to the victim," her theory similarly leaves a gap with respect to crimes based on diffused theories of victimization—a particularly common phenomenon in corporate crime.<sup>40</sup>)

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wants is not simply that the agent suffer, but that she suffer *in recognizing* what she has done, in being brought face to face with the harm that she has caused or risked, the disrespect she showed, and so on.").

36. Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 111, 123 (1988).

37. Markel & Flanders, *supra* note 26, at 911. Markel and Flanders appear to concede this. *Id.* at 946 ("[T]he goal is not to cause the offender unvariegated suffering, but to communicate to the offender the wrongness of his action, using particular deprivations to signal that condemnation.").

38. See, e.g., Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 735–36 (1988); Hampton, *supra* note 36, at 125–26; Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 477 (1968); Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, CRIM. JUST. ETHICS, Winter/Spring 1985, at 3, 6–7; see also Duff, *supra* note 19, at 26–27 (summarizing such arguments and their critics).

39. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1660 (1992); see Morris, *supra* note 38, at 477–78. An additional problem with the application of Morris' retributive theory to corporations is that he argues in terms of the offender's "right" to be treated as a moral agent by receiving his desert. When we speak about any rights of corporations, we speak about legal and procedural rights, not human rights.

40. Hampton, *supra* note 39, at 1698.

Retributive punishment therefore requires at least the potential for a wrongdoer to endure deprivation.<sup>41</sup> As a corollary, there can be no “negative” retributivist objection to excess punishment where there can be no such experience to endure. Thus, in the absence of wrongdoers’ experiential capacity, punishment can neither be justified nor restrained on the basis of retributivist argument.

## B. Corporate Wrongdoing

Probably the most common objection to punishing corporations on the basis of retributive justifications is, in general terms, that corporations are not people and therefore cannot be blameworthy.<sup>42</sup> This claim—that corporations categorically lack moral agency—runs contrary to widespread social practice and is not persuasive.

Start with the question of what is required in order to have a blameworthy subject in terms of punishment theory, that is, a wrongdoer deserving of punishment. There must be an act and the act must be morally wrong in one or more ways sufficient to justify criminal punishment.<sup>43</sup> Corporations, as phenomena in the world, plainly do things—that is, produce outcomes—some of which are deeply concerning on dimensions such as harm and risk that amply justify discussion about legal response.<sup>44</sup> Indeed, we live in a world pervaded by the activities of corporations as well as laws and legal procedures that are responsive to those activities.

To argue that “corporate acts” are not a distinct phenomenon from the individual actions of the people (some of them often independently blameworthy as wrongdoers, but many of them frequently not so) whose behavior contributed

41. It is an interesting question whether people can be made to endure deprivations when they are no longer alive, as in the situation of posthumous harm to reputation. See Ben Bradley, *Well-Being and Death*, in *THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF WELL-BEING* 320, 325–326 (Guy Fletcher ed., 2016) (discussing the possibility of posthumous harm to a person’s well-being). I do not see this problem as having implications for theories of corporate punishment. Any theory of posthumous effects on well-being would seem to depend on the subject having once lived.

42. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1373 (2009) (“The word ‘criminal’ has its distinctive significance, however, because this word means blameworthy. Someone who applies this word to objects and entities that are not blameworthy uses the label falsely.”).

43. See Hampton, *supra* note 39, at 1662 (“A wrongful harm or loss only comes from wrongful conduct by an agent thought to be culpable.”); Husak, *supra* note 23, at 983 (“[A] state of affairs cannot be identified as a harm (in the relevant sense) without reference to morality. Conduct produces harm to others when it infringes their rights. Therefore, conduct that does not infringe anyone’s rights, however unwanted or undesirable it may be, simply does not cause harm in the sense that renders it eligible for proscription. For each of these reasons, a harm theorist, no less than a legal moralist, requires a conception of morality to get his theory of criminalization off the ground.”); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1290 (2000) (“Paradigmatically, one deserves punishment only for engaging in a wrongful act while having a relevant culpable state of mind.”).

44. See Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1483–84 (2009) (“Modern corporations not only wield virtually unprecedented power, but they do so in a fashion that often causes serious harm to both individuals and to society as a whole.”).

to the corporate act is not persuasive. Furthermore, it is not material to doctrine whether one calls this problem one of “action,” “corporate acts,” or “collective actions,” or whether this problem matches the way traditional criminal law doctrine deals with the “act requirement.” Law has developed functional tools for ascribing the results of collective activity within corporations to corporate entities, including agency doctrines such as *respondeat superior* that control in both criminal prosecutions and many civil actions.<sup>45</sup>

Acts can be ascribed to corporations, and it makes perfect sense to do so. Modern industrial society would be unintelligible without a coherent moral and linguistic framework for attributing the oil spill to the energy company, the overdose deaths to the pharmaceutical firm, the defective air bag to the automobile parts manufacturer, and so on.<sup>46</sup> Of course these events result from the actions of individual persons. But they can be coherently described, much less occur as they do, *only if* there is such a phenomenon as group action (the whole) distinct from a collection of individual actions (the sum of the parts).<sup>47</sup> Anyone who has spent time studying scandals, compliance, corporate culture, management, and corporate governance would agree that it is sophistic to maintain that corporations do not act because they are not people.

In retributive theory, action alone is not sufficient to justify criminal liability. Actions must be morally wrong to warrant punishment. Some might argue that actions themselves can be sufficiently morally wrong to warrant punishment in the absence of culpability—that some instances of the law punishing on the basis of strict liability are not just means of influencing behavior but also of blaming for the imposition of serious harms. But that would be an uncommon view.<sup>48</sup> As a matter of both positive and negative retributivism, it is generally agreed that

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45. See *N.Y. Cent. & Hudson River R.R., Co. v. United States*, 212 U.S. 481, 492–93 (1909); *United States v. Dye Constr. Co.*, 510 F.2d 78, 82 (10th Cir. 1975); see also MODEL PENAL CODE § 2.07 (AM. LAW INST., Official Draft 1985); Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 370–71 (2003).

46. See Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1149 (1982) (“When people blame corporations . . . they are condemning the fact that people within the organization collectively failed to avoid the offense to which corporate blame attaches.”).

47. See PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* 41–42 (2002) (examining “[t]he importance of concepts of group legal responsibility”); D.E. Cooper, *Collective Responsibility*, in *COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS* 35, 35–36 (Larry May & Stacey Hoffman eds., 1991) (describing “Collective Responsibility” and “Individual Responsibility” as distinct concepts); CHRISTOPHER KUTZ, *COMPLICITY* 112, 144–45, 192 (2000) (discussing the relationship between collective action and individual action); LARRY MAY, *THE MORALITY OF GROUPS* 65 (1987) (arguing that corporate organization and procedures “combine and change the intentional states of key members of the organization so as to result in purposive behavior for the group”); LARRY MAY, *SHARING RESPONSIBILITY* 75 (1992) [hereinafter MAY, *SHARING RESPONSIBILITY*] (stating that individuals “act differently in groups than they would on their own” due to the relationships between group members).

48. Even a strongly “harm-based” (as opposed to “intent-based”) account of moral responsibility, see Ashworth, *supra* note 38, at 735–36, depends at least implicitly on a conception of *how* it is that one deserves to be blamed for the hurt one’s actions cause others, a conception that must include some account of the harm-doer’s failings as a moral agent capable of deliberation.

there must be moral blameworthiness in an action to justify punishment, and that blameworthiness generally follows from cognitive culpability, that is, from the beliefs, attitudes, or choices that gave rise to the actions in question.<sup>49</sup> Without sufficient blameworthiness in the form of morally faulty cognition, there can be no desert of punishment.

This is where arguments against corporate retributivism have usually staked their claim. Independent of questions involving the doctrinal particulars of *mens rea*, punishment theory generally holds that morally wrongful choice (a decision to impose unjustified harm or risk of harm on another, for example) is the type of culpability that is necessary to any argument for blameworthiness.<sup>50</sup> This condition can be stated in various ways, but that is a serviceable approximation of what modern punishment theory has established in place of, or to build upon, the criminal law's ancient requirement of "general *mens rea*," or what is sometimes called the Blackstonian idea of an "evil" or "wicked" mind."<sup>51</sup>

The most common argument one hears against corporate retributivism is that corporations do not have minds, so cannot make wrongful choices, and thus cannot be morally blameworthy.<sup>52</sup> Corporations therefore cannot deserve punishment. As with the question of corporate action, the problem is theoretical, not doctrinal. The law of corporate criminal liability has a number of options for locating corporate *mens rea*, including of course the vicarious liability approach of *respondeat superior* doctrine followed by federal law in the U.S. The doctrinal problem has produced a lively and still productive literature,<sup>53</sup> but that debate is about implementation.

The question prior to doctrine is whether it is coherent to blame a corporation for the "choices" it makes when corporate actions, at least in cases involving firms of any substantial size, are the product of the thinking and deliberations of multiple persons. An affirmative answer is straightforwardly established in three steps.<sup>54</sup>

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49. E.g., Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 377–379 (2008); MOORE, *supra* note 13, at 191–93; Moore, *supra* note 26, at 30, 41–42.

50. See *supra* note 49.

51. See *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 494 (E.D.N.Y. 1993) (referring to the historical requirement of an "evil intent" in criminal law); see also *Kahler v. Kansas*, 240 S.Ct. 1021, 1039–45 (2020) (Breyer, J. dissenting) (arguing that, based on historical evidence, "[a] defendant who, due to mental illness, lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime").

52. E.g., Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, 2 BUS. & PRO. ETHICS J. 1, 12 (1983) ("All that a corporation's members should have to suffer is the blame and punishment consequent on their own moral responsibility; to make them suffer the punishment that should have been levied on the corporate structure would be to punish them twice. But in fact it is not possible to impose blame or punishment upon an organizational structure without having that blame or punishment fall on the shoulders of the corporation's members . . . . These members are therefore being unjustly forced to bear the punishment for another entity's moral responsibility.").

53. See, e.g., Andrew Weissmann & David Newman, *Rethinking Corporate Criminal Liability*, 82 IND. L.J. 411 (2007).

54. For a book-length development of the argument, see CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2011).

First, if collective human decision making is an actual phenomenon—which seems incontrovertible—then it is coherent to ascribe responsibility to groups for bad decisions. Second, group responsibility is a distinct phenomenon from individual responsibility, that is, one communicates something different or additional when one blames a group for a wrong decision than when one blames members of that group for making wrong decisions or having a role in the group decision. Third, if group blame is warranted, then it is sensible, in an instance of group decision making within a corporation, to select the corporation as the object of that blame.<sup>55</sup>

Perhaps the last point is the most debatable of the three. But—except maybe in exceptional corporate cases—it would be hard to find a better representation of the group than the corporation, just as one would point to the gang, the family, the team, the clique, the band, and the like, for blame in other group contexts. In other words, it would be odd, in a case of blameworthy group decision making within a corporation, to say something like, “Well any legal blame must be directed at the corporation because it is the only legal person in this picture other than the individuals, but moral blame really belongs with a different, non-legal entity like ‘the people who work at the corporation.’”

Thus, the widespread contemporary social practice of blaming corporations for producing wrongs is analytically sound.<sup>56</sup> If retributive theory cannot be applied coherently to corporations, it is not because corporations cannot be blameworthy and thus deserving of punishment.

### C. Corporate Punishment

It is at the point of punishment—the deliverance of what is deserved—that retributivism loses purchase on corporate criminality. Joel Feinberg, in his famous theorizing of the concept of desert, puts the matter thusly:

What are the various kinds of treatment that persons deserve from other persons? They are varied, but they have at least one thing in common: they are generally “affective” in character, that is, favored or disfavored, pursued or avoided, pleasant or unpleasant. The deserved object must be something generally regarded with favor or disfavor even if, in some particular case, it is regarded with indifference by a person said to deserve it. If we were all perfect stoics, if no event were ever more or less pleasing to us than any other, there would be no use for the concept of desert.<sup>57</sup>

Or, as Mitchell Berman puts it:

[T]o a rough first approximation, what wrongdoers deserve on account of their wrongdoing is that their lives go less well. To a second pass . . . [a]n individual who engages in wrongdoing deserves that her life go less well than it otherwise would have

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55. See *id.* at 153–63 (expanding on the argument that “we have every reason to hold group agents responsible” for their actions, not just the individuals that compose those groups).

56. For extended argument in support of both this claim and the general proposition of group responsibility, see the ample legal and philosophical literatures. *E.g.*, CANE, *supra* note 47; Benjamin Ewing, *The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility*, 8 J. TORT L. 1, 20–28 (2015) (discussing how corporations can be morally and attributively responsible for torts); KUTZ, *supra* note 47; LIST & PETTIT, *supra* note 54; MAY, SHARING RESPONSIBILITY, *supra* note 47.

57. FEINBERG, *supra* note 16, at 61.

gone, and less well in proportion to the blameworthiness of her wrongdoing, and that she understands that it goes less well as a consequence of her wrongdoing.<sup>58</sup>

This is where the idea that “corporations are not people” causes punishment theory constructed for the problem of punishing individuals to fail when applied to corporations.<sup>59</sup> In terms of the discussion described above, if a corporation cannot experience hardship because it is not a sentient being—either actually or in any analogous way that could accommodate the concept of enduring painful or unwelcome treatment—then it does not matter whether one is an “objectivist” or a “subjectivist” about retributive punishment. Corporations do not experience pain or suffering differentially or occasionally. They simply do not feel anything.

One might assert that while corporations cannot experience pain, they are projects that can go well or poorly in the world depending in part on what is done to them, including by the state. Thus, one might say, corporations can deserve to have their affairs go less well and their affairs can be made to go less well as a consequence of this desert.

In terms of the discussion of retributive theory above, one can, at a first pass, plausibly say that corporations can have their interests set back. Corporations, after all, do have interests, at least legal and economic ones. In addition, corporations can possibly have their well-being reduced—but only if the concept of well-being applies to legal entities, a matter that well-being theory has not fully addressed and that appears doubtful under the field’s more persuasive conceptions of well-being, including even theories that do not depend on a hedonic conception of well-being.<sup>60</sup>

But without affective capacity, a corporation can feel or experience nothing when its affairs have gone less well, and thus in no sense can it be said that retribution has been imposed, received, or even sensibly directed at the corporation.<sup>61</sup> Something major may have happened to the corporation that may produce consequences, including instrumentally desirable ones. But at the point

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58. Berman, *Rehabilitating Retributivism*, *supra* note 31, at 87–89.

59. See Alex Sarch, *Skepticism About Corporate Punishment Revisited*, in THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 213, 217 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019) (“Suppose we grant that in convicting and fining the corporation, we are not engaging in *real* punishment. At best, it is a bad imitation of punishment—call it punishment\*. Why is this intrinsically bad? Assuming, as we are, that there are weighty consequentialist reasons for punishment\*, is conceptual confusion a substantial hurdle to adopting or continuing with that practice?”).

60. See, e.g., Willem van der Deijl, *The Sentience Argument for Experientialism About Welfare*, PHIL. STUD. (2020), <https://link.springer.com/content/pdf/10.1007/s11098-020-01427-w.pdf> [<https://perma.cc/37HL-4HBW>] (concluding that “the most plausible and intuitive account suggests that all and only sentient beings have wellbeing” and defining sentience as “the capacity to have phenomenological consciousness, i.e., the capacity to have experiences”). See generally Stephen M. Campbell, *The Concept of Well-Being*, in THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF WELL-BEING, *supra* note 41, at 402.

61. Interestingly, Jean Hampton, in one of her foundational writings on her original theory of retribution, discusses its application to corporations (using the Ford Pinto scandal and litigation) as an illustration of the theory of an offender’s low moral valuation of victims, without considering the question of whether and how a corporation (Ford in this case) could be a subject of retributive treatment. Hampton, *supra* note 39, at 1689.

of punishment's imposition, retribution has not occurred. Instead, punishment has merely contributed to the sum of the inputs to a corporation's existence that determine how the institutional project will fare as it goes forward—in success, failure, or mediocrity.<sup>62</sup>

This would hold true even if it were somehow possible to imprison a corporation. From a retributive point of view, the problem is not that corporations are too big to jail but rather that they are too inhuman to feel. To cripple a corporation with, for example, a massive fine and to say, “Take that, Acme Corp, you got what you deserved. How do you like them apples?” is no more coherent than, after kicking the chair over which one has stumbled in the night, telling the chair that the blow better have hurt. To use a different analogy, attempting to mete out retribution to a corporation might be akin to carrying out the death penalty for retributive reasons on a person who is insane and incapable of understanding what is happening.<sup>63</sup>

A further implication of this analysis is that it makes no sense to talk about negative retributivism with corporate punishment. Even in a predominantly instrumental program of corporate punishment, retribution plays no logical role in *constraining* such punishment.<sup>64</sup> Of course, few who have explored corporate retribution have done so out of worry about punishing corporations that are not blameworthy. But there has been substantial discourse about the unfairness of corporate criminal prosecutions with respect to certain individuals, especially investors and employees (the so-called collateral consequences problem in corporate crime). There may be good instrumental reasons to worry about effects on such persons—as well as perhaps the sort of deontological worries that can be relevant to thinking about the effects of criminal punishment on third parties such as family members. As important as such considerations might be in the corporate context, however, they do not implicate negative retributivism's concern with state imposition of undeserved deprivations on a subject of criminal punishment.

### III

#### THE ARGUMENT FROM POLITICS

What is left, then, of the idea of retribution as a justification for corporate criminal liability? If one attends to public and political discourse about corporate crime, as well to elements of the academic literature, one often hears versions of the claim that blameworthy corporations should be punished with retribution in mind because people, often very large portions of the population, correctly form

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62. Cf. Markel & Flanders, *supra* note 26, at 932 (“[T]o punish someone is to say that flouting the law cannot simply be fixed by compensation or an acknowledgement of causation alone.”).

63. See *Ford v. Wainwright*, 477 U.S. 399, 405–10 (1986) (holding that the Eighth Amendment bars the imposition of the death penalty on an insane prisoner). Thanks to Kim Ferzan for raising this point.

64. See generally Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815 (2007) (exploring the possible applications of retributive theory to the decisions of various actors at stages of the criminal justice process).



beliefs that corporations deserve punishment for their serious wrongs.<sup>65</sup> Failing to deliver that desert, on this claim, deprives people of something they have demanded and are entitled to. Delivering it provides the public with satisfaction that blameworthy corporations have received their due—which could be useful in various ways, and could be the right thing to do regardless of whether doing so produces benefits.<sup>66</sup>

In relation to the argument that imposing retribution on corporations is not possible, this claim is a non sequitur rather than a rejoinder. No matter how blameworthy a corporation might be, and no matter how strenuously the public might maintain that a corporation deserves punishment as a result, if a corporation cannot experience retribution, then retribution cannot be imposed.

The actual, and usually unarticulated, claim here is that punishing corporations in the name of retribution—even if retributive punishment of corporations is not possible—is instrumentally beneficial. This is an argument that falls, roughly speaking, into a long line of scholarship concerned with the utility of retribution and with the expressive function of criminal law.<sup>67</sup> This rich theoretical tradition dates at least to the work of James Fitzjames Stephen in the nineteenth century.<sup>68</sup>

This is a sensible line of argument, indeed one I have defended at length in the context of corporate criminal liability.<sup>69</sup> To truncate my own instrumental version of this consequentialist line of argument, the practice of blaming legal entities through criminal legal treatment can be a particularly potent way of causing individuals engaged in group projects to internalize the significance and origins of the most serious institutional failures and alter group conduct to reduce future incidence of like failures.

Arguments in this tradition do not help establish the claim that corporate prosecutions are justified on the grounds that they fulfill a retributive moral imperative. Seeing this—and fully incorporating the point into the literature on corporate crime—is much more than a matter of accuracy in terminology. It does no great harm (except perhaps to the sensitivities of academic theorists) for people to go around bemoaning the failure to adequately punish corporations for their terrible moral awfulness, and so on. But it can do considerable harm to the

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65. E.g., Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618–22 (1998).

66. See generally Mark Dsouza, *Lessons from Analogising Natural and Corporate Persons in the Criminal Law* (unpublished manuscript) (on file with author).

67. E.g., Mark Dsouza, *The Corporate Agent in Criminal Law: An Argument for Comprehensive Identification*, 79 CAMBRIDGE L.J. 91, 104 (“A criminal law that fails to assign labels that (at least broadly) correspond to public perceptions lacks sociological legitimacy and public credibility, which are amongst its main tools for guiding and modifying public behaviour.”).

68. 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 80–83 (London, MacMillan & Co. 1883); see also Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS., nos. 3–4, 1997, at 23, 39–40 (1997) (discussing retributive theory in corporate criminal law).

69. Buell, *supra* note 4; see also Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 48–55 (2012) (arguing for the expressive value of corporate punishment).

urgent policy debate about corporate crime, and the connection of that debate to useful theoretical work by scholars, for people to fail to follow through on the meaning and significance of demands for corporate retribution.

Those demands, under scrutiny, should lead to more careful and thus more useful analysis of what is to be *accomplished* through corporate criminal liability. Otherwise, they are conclusory assertions—dead ends that can only stand in the way of progress on matters of great public import and theoretical difficulty.

#### IV

#### CORPORATE PROSECUTIONS

So, what is it that corporate prosecutions do? This is of course a familiar question for scholars. The foregoing analysis of the matter of the retributive function in criminal punishment may help with the enduring search for clarity in answering the question.

##### A. The Justice Department Program

On June 16, 1999, the DOJ for the first time consecrated its by then modern, growing program of enforcing the doctrine of corporate criminal liability, a legal rule that had been extant in American law for over a century. The founding document was a memorandum titled “Bringing Criminal Charges Against Corporations,” which attached a set of principles for “Federal Prosecution of Corporations.”<sup>70</sup> The memorandum was signed by then Deputy Attorney General Eric Holder. It became known as the “Holder Memo,” but the prosecution principles were enshrined in the Justice Manual, a quasi-regulatory document that for many decades was known as the United States Attorneys Manual.<sup>71</sup>

The DOJ has amended its principles for corporate prosecutions many times since the Holder Memo.<sup>72</sup> Some of those changes have substantially altered the dynamics of investigation and settlement in corporate enforcement. The DOJ, however, has never wavered from the foundational theory of corporate prosecution set out in the introductory language of the Holder Memo: that the prosecution of corporations can advance social welfare by helping to reduce the incidence of corporate crime and that a federal prosecutor should assess whether to charge a corporation based on a thorough balancing of the costs and benefits

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70. Memorandum from Eric H. Holder, Jr., Deputy Att’y Gen., to All Component Heads and U.S. Att’ys on Bringing Criminal Charges Against Corporations (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/58TE-FKSZ>].

71. U.S. Dep’t of Just., *supra* note 8, §§ 9-28.000 *et seq.*

72. See Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1 (2006) (outlining the evolution of DOJ policies regarding corporate entities); Court E. Golumbic & Albert D. Lichy, *The “Too Big to Jail” Effect and the Impact of the Justice Department’s Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1301–12 (2014) (describing the DOJ’s changing use of deferred prosecution agreements in corporate prosecutions).

of prosecution.<sup>73</sup> Other than references to vague concepts such as “the nature and seriousness of the offense,” the DOJ’s policy does not explicitly direct prosecutors to pursue the objective of corporate retribution.

In the two decades since the Holder Memo, the DOJ has developed a thoroughlygoing instrumental program of corporate criminal enforcement. This focus largely explains the development of DPAs and NPAs as the prevalent means of resolving corporate criminal actions and the heavy outsourcing of the investigative function to compliance operations and private lawyers working for corporations.<sup>74</sup>

Criticisms of the DOJ’s enforcement program have been persistent throughout the past two decades, and have grown in the wake of the financial crisis of 2008. Indeed, Holder himself, when later serving as Attorney General in the Obama Administration, sustained heavy media fire for his handling of settlements with the large financial institutions that dominated the mortgage-backed securities industry.<sup>75</sup>

The lion’s share of criticism of the DOJ has been instrumentally oriented: that, contrary to its aspirations, the DOJ is not achieving effective deterrence of corporate crime because, for example, federal prosecutors fail to charge enough (and senior enough) individuals, fail to impose sufficiently costly fines on companies, and are unwilling to pursue corporate cases all the way to trial even at the cost of potentially putting firms out of business.<sup>76</sup> But an oft-repeated theme in the criticisms has been that DPAs and NPAs do not treat corporate crime seriously enough, that corporations are “let off too easy” when they avoid convictions, and that the DOJ has not been willing to treat “corporate criminals” (possibly meaning both people and firms) with the harshness that the federal system routinely inflicts on street offenders.<sup>77</sup>

There is a clear retributive color to these criticisms. When the DOJ appears to pull punches in corporate cases, especially in high profile cases of extensive and noteworthy harm, it leaves the impression that amply blameworthy organizations are not getting what they deserve. What justice requires has not been fully delivered and thus prosecutors have failed in their duties.

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73. U.S. DEP’T OF JUST., *supra* note 8, at § 9-28.010.

74. For a full description of this history, see Arlen & Buell, *supra* note 9.

75. See generally EISINGER, *supra* note 10; MATT TAIBBI, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* (2014).

76. See, e.g., Russell Mokhiber, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORP. CRIME REP. (Dec. 28, 2005), <https://www.corporatecrimereporter.com/deferredreport.htm> [<https://perma.cc/2HTW-8PSK>] (arguing that “the rise of [DPAs and NPAs] has undermined the general deterrent and adverse publicity impact that results from corporate crime prosecutions and convictions”); Uhlmann, *supra* note 10, at 1301–02 (arguing that the “disturbing trend” of the DOJ’s use of DPAs and NPAs “undermines the rule of law”); Michael Patrick Wilt, *Who Watches the Watchmen? Accountability in Federal Corporate Criminal Prosecution Agreements*, 43 AM. J. CRIM. L. 61, 65 (2015) (criticizing DPAs and NPAs for “promoting unfairness within the criminal justice system and creating uncertainty for corporations in planning and cooperating with the government”).

77. See generally sources cited *supra* note 10.

In light of the analysis in this Article, this failure, and the persistence of frustration and criticism, are inevitable because corporations can be blameworthy but cannot be punished retributively. There will always be a gap between what corporations deserve and what they receive.<sup>78</sup> This is only one of many ways in which our fraught relationship with the large modern business corporation leaves us confused and unsatisfied.<sup>79</sup>

## B. Why Indictments and Convictions Might Matter

It is predictable, of course, that the public would be dissatisfied with the routine treatment of corporate crime using a legal vehicle called “nonprosecution” or “deferred prosecution.” Especially against the background of mass incarceration and widespread and visible procedural inequalities in criminal justice, few things could be less attractive than pursuing major corporate crimes—which, as in the opioid scandal, can involve especially aggravated moral blameworthiness—with less prosecutorial action than is routinely used to pursue minor street crime.

It is thus not surprising that in recent years the DOJ, in obvious reaction to public criticism, has pursued more resolutions with corporations involving guilty pleas, even as NPAs and DPAs have continued to dominate. Corporate pleas and convictions have been particularly evident in more noteworthy cases, such as the BP oil spill, the Walmart foreign bribery matter, and the LIBOR and Forex trading affairs involving financial institutions that had previously resolved criminal cases through NPAs. Fifteen years ago, conventional wisdom held (mistakenly, it turned out) that reputable corporations could not survive indictment and that the prosecution of the Arthur Andersen accounting firm had proved the folly of prosecutors pursuing corporate convictions.<sup>80</sup>

A conundrum in the modern practice of corporate criminal liability is why conviction for corporations should matter when the criminal process cannot impose sanctions on corporations that are different in kind, or even theoretically in degree, than civil lawsuits and regulatory enforcement actions.<sup>81</sup> A common answer is that criminal convictions carry the potential of crippling delicensing and debarment sanctions, collateral consequences that may not be available under civil regimes. That is undoubtedly the major reason convictions matter to firms and their lawyers. But it seems unlikely that public dissatisfaction with DPAs and

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78. See Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 517 (2018) (“Despite its presence in the popular press, the retributivist approach to corporate punishment is relatively under-theorized, and it is a minority position among academics. Those who do embrace retributivism usually work with an expressive form of the theory according to which criminal law is a tool for expressing public moral condemnation.”).

79. See generally BUELL, *supra* note 9.

80. See, e.g., Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006).

81. Khanna, *supra* note 11, at 1492–93; see also Thomas, *supra* note 7, at 617 (“The failure of corporate-criminal fines is that, as a sanction purportedly expressing particularly severe condemnation, they nevertheless are indistinguishable from civil sanctions.”).

NPA's has been grounded in the relatively obscure matter of debarment rules under federal law.

A more plausible explanation for the significance of pleas and convictions is that they express legal consecration of the corporation's wrongdoing and blameworthiness to a degree that DPAs and NPAs cannot.<sup>82</sup> Even though such agreements typically require companies to admit the facts of wrongdoing, they do not require companies to say "guilty" in court and they do not involve an independent judicial officer entering a judgment of conviction on a court's docket and performing the ritual of imposing a "sentence" (as opposed to the parties' agreement to similar sanctions by the terms of a contract).

This expression may well matter to the public, and thus to the DOJ, because it treats corporate crime with the sort of condemnation that seems deserved. Doing so may (or may not) have social welfare benefits—a question that warrants continued exploration. But whatever the conviction and sentencing of a corporation is, it is not, and cannot be, retributive. It must be justified according to the consequences that follow from it.

## V

### CONCLUSION

Retributivism is, after all, a theory of punishment—not, or not ultimately, a theory of responsibility. Retributive punishment is punishment that causes, or is at least meant to cause, its subject to experience and endure pain, suffering, or a deprivation of substantial rights or interests. Without at least the expectation of such an experience, punishment cannot affect its subject in a manner that could be deserved on account of the moral wrong that is a crime. Because corporations cannot experience such pain, suffering, or deprivations, they cannot be punished *on retributive grounds*.

"Corporate retribution" is thus no such thing. To the extent that use of this terminology persists in the discussion of corporate crime, it is a placeholder for a line of consequentialist argument. Analysis of corporate crime should continue to pursue the difficult question of whether and how it is justified and beneficial to engage in blame-based projects of prosecuting and convicting corporations. Important puzzles remain to be solved about the use of criminal law's potent moral tools against institutions rather than people. Meanwhile, it is a confusion and a distraction to continue to discuss corporate criminality as if it were anything other than a rich instrumental problem. This Article has been a call to stop doing so.

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82. Fisse, *supra* note 46.